Supreme Court, U.S.
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No. 97-1829

In the
Supreme Court of the United States
October Term, 1997

Deborah West, in her individual capacity and official capacity as an agent of the State of North Carolina; Janice Faulkner, Secretary of Revenue, State of North Carolina, in her official capacity; State of North Carolina,

Petitioners,

v.

David L. Lynn, Jr.; Robin Dixon Lynn; Rodney Lynn; Roxanne Lynn; David L. Lynn, Sr.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ADDITIONAL REASONS FOR GRANTING PETITION 1

CONCLUSION 6

APPENDIX:

COMPLAINT, *MORRISON V. STATE OF NORTH CAROLINA*, AUGUST 24, 1998 ..... 1a

NOTICE OF CONTROLLED SUBSTANCE TAX ASSESSMENT FOR DANIEL AURTHUR MORRISON, JANUARY 30, 1997 ..... 9a

ORDER - PRELIMINARY INJUNCTION IN *MORRISON V. STATE OF NORTH CAROLINA*, SEPTEMBER 4, 1998 ..... 13a

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE, *MCADAMS V. HARDIN*, SEPTEMBER 14, 1998 ..... 17a

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TABLE OF AUTHORITIES

CASES

Abney v. United States, 431 U.S. 651 (1977) 4

Lynn v. West, 134 F.3d 582 (4th Cir. 1998) 1,5

State v. Ballenger, 472 S.E.2d 572 (N.C. Ct. App. 1996), *aff'd per curiam*, 481 S.E.2d 84 (N.C.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 68 (1997) 2,5

State v. Creason, 473 S.E.2d 771 (N.C. Ct. App. 1996), *aff'd per curiam*, 484 S.E.2d 525 (N.C. 1997) 2,5

Younger v. Harris, 401 U.S. 37 (1971) 4

STATUTES

42 U.S.C. § 1983 3

N.C. Gen. Stat. §§ 105-113.105 through 105 -113.113 . 1,2

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In the
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No. 97-1829

Deborah West, in her individual capacity and official capacity as an agent of the State of North Carolina; Janice Faulkner, Secretary of Revenue, State of North Carolina, in her official capacity; State of North Carolina,

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David L. Lynn, Jr.; Robin Dixon Lynn; Rodney Lynn; Roxanne Lynn; David L. Lynn, Sr.,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

ADDITIONAL REASONS FOR GRANTING PETITION

In their petition for writ of certiorari, petitioners urged the Court to issue its writ of certiorari because the United States Court of Appeals for the Fourth Circuit erroneously held in *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), that the provisions of North Carolina's "drug tax," N.C. GEN. STAT. § 105-113.105 through § 105-113.113, constituted a criminal penalty. Among the myriad problems and concerns facing North

Carolina as a result of *Lynn* was the conflict between that decision and two decisions of the North Carolina appellate courts holding that the "drug tax" is not a criminal penalty. *State v. Ballenger*, 472 S.E.2d 572 (N.C. Ct. App. 1996), *aff'd per curiam*, 481 S.E.2d 84 (N.C.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 68 (1997); *State v. Creason*, 473 S.E.2d 771, 772 (N.C. Ct. App. 1996), *aff'd per curiam*, 484 S.E.2d 525 (N.C. 1997). That conflict raises a formidable threat to the convictions of drug offenders and the ongoing and future prosecutions of other drug offenders who had been assessed taxes pursuant to N.C. GEN. STAT. §§ 105-113.105 *et seq.*:

> Although North Carolina is not now collecting additional drug tax money, in deference to the court of appeals' opinion, numerous criminal cases inevitably exist in which defendants have not exhausted their appeals or may still petition for habeas corpus relief, asserting double jeopardy claims on the theory that payment of the drug tax precluded their subsequent criminal convictions for drug offenses.

Petition, p. 18. The threat to those prosecutions has now become painfully real, and North Carolina's need for resolution of these conflicting decisions has now become acute.

North Carolina now faces challenges to criminal convictions and sentences from drug offenders who were assessed "drug taxes" prior to their convictions, but more significantly it is fighting challenges to its ability to prosecute accused drug offenders who claim that they are immune from

prosecution on double jeopardy grounds because of earlier drug tax assessments. On September 4, 1998, the United States District Court for the Western District of North Carolina issued a preliminary injunction ordering the State District Attorney for North Carolina Prosecutorial District 20-B not to prosecute a state court defendant on four charges of trafficking in cocaine. *Morrison v. State of North Carolina, et al.*, No. 3:98-CV-370-MU (W.D.N.C. September 4, 1998) (order granting preliminary injunction), App. 13a-15a. The court did so on plaintiff Morrison's claim, brought under 42 U.S.C. § 1983, that his right to be free of Double Jeopardy would be violated by the prosecutions because he had been assessed excise taxes on possession of the same drugs. *See* Complaint, App. 1a-8a. The injunction extended only to four of five pending prosecutions because no assessment had in fact been made as to the drugs at issue in the fifth prosecution. Nevertheless, four drug trafficking prosecutions involving 390.8 grams of cocaine have been enjoined because of a single assessment resulting in collection of only $315. *See* App. 4a, 10a. Thus, in the view of the United States District Court for the Western District of North Carolina, a state court defendant who has never been subjected to a criminal prosecution and from whom only a nominal amount has been collected is protected from prosecution for four separate drug trafficking charges,.

The confusion and uncertainty surrounding prosecution of drug offenses in North Carolina has been enhanced by the result in yet another recent challenge to the State's ability to prosecute an accused on drug trafficking charges. In the Middle District of North Carolina, a petition for habeas corpus was

filed by an accused seeking to halt prosecution on three drug trafficking charges on the grounds that he previously had been subjected to punishment in the form of the drug tax assessment. In that case, however, the magistrate judge initially hearing the request for a stay of the criminal prosecution recommended denial of the stay and dismissal of the proceeding. *McAdams v. Hardin*, No. 1:98CV786 (M.D.N.C. September 14, 1998) (recommendation of United States Magistrate Judge for denial of stay and dismissal), App. 17a-31a.

In the two federal cases, *Morrison* and *McAdams*, the State contended that the district court should abstain on the basis that federal courts should rarely, and only under extraordinary circumstances, enjoin pending state criminal prosecutions. *Younger v. Harris*, 401 U.S. 37 (1971). These cases do not present such extraordinary circumstances even though they raise double jeopardy claims because in neither instance has the state court defendant been previously subjected to a trial or actual prosecution. In each case, his only double jeopardy claim stems from a non-judicial assessment and the collection of a relatively small amount of money. Since their only double jeopardy claims are ones of potential multiple punishment, neither state court defendant faced the irreparable harm of multiple trials that would override the *Younger* abstention rule or that would constitute irreparable harm for purposes of a stay or preliminary injunctive relief. *See Abney v. United States*, 431 U.S. 651, 660 (1977) ("[t]o be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final

judgment."). Evidently, the same argument prevailed to allow prosecution in *McAdams*, but was rejected in *Morrison* so that his prosecution on four discrete drug trafficking charges has been enjoined.

In addition to serving as the basis for conflicting federal district court rulings, *Lynn* has generated several recent attacks on the "drug tax" in North Carolina state courts. Criminal defendants are attempting to stop drug trafficking prosecutions by moving to dismiss indictments filed in the trial courts, and appeals from trial court rulings are pending in the state appellate courts, with more anticipated. On another front, *Lynn* has also spawned a civil class action seeking refunds of taxes already assessed and collected. *Milligan v. State of North Carolina*, 98 CVS 07891, Superior Court of Wake County, North Carolina. In each instance, *Lynn* is being used as a lever in litigants' attempts to overturn established rulings of North Carolina's appellate courts, rulings that were left undisturbed by this Court, upholding the "drug tax."

If this Court does not issue its writ of certiorari, North Carolina's state and federal courts will be repeatedly confronted with the untenable situation of two contradictory rulings by independent and co-equal judicial sovereigns on the same point of law. Moreover, as the *Morrison* and *McAdams* decisions highlight, North Carolina's ability to prosecute drug trafficking charges is threatened by the uncertainty surrounding the nature of its drug tax statutes -- whether they do indeed impose a criminal penalty, as the court of appeals held in *Lynn*, or whether they do not impose a criminal penalty, as the state

courts have held in *Ballenger* and *Creason*. Until this uncertainty is cleared up, North Carolina may be thwarted in its ability to prosecute perhaps hundreds of accused drug traffickers or be put to the test to fight them in federal court as to whether their state court prosecutions should be enjoined. The ability of the State effectively to combat drug trafficking will be severely hampered if hundreds of accused drug traffickers cannot be prosecuted.

CONCLUSION

For the reasons set out initially in the Petition for Writ of Certiorari and supplemented in this Supplemental Brief, petitioners urge this Court to issue its writ of certiorari in order to (1) resolve the conflict between the rulings of the state and federal courts, (2) hold that North Carolina's drug tax is not a criminal penalty such that it bars subsequent criminal prosecutions, and (3) permit North Carolina and similarly-situated states to prosecute accused drug traffickers.

Respectfully submitted,

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September 22, 1998

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APPENDIX

TABLE OF CONTENTS

COMPLAINT, *MORRISON V. STATE OF NORTH CAROLINA*, AUGUST 24, 1998 ..... 1a

NOTICE OF CONTROLLED SUBSTANCE TAX ASSESSMENT FOR DANIEL AURTHUR MORRISON, JANUARY 30, 1997 ..... 9a

ORDER - PRELIMINARY INJUNCTION IN *MORRISON V. STATE OF NORTH CAROLINA*, SEPTEMBER 4, 1998 ..... 13a

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE, *MCADAMS V. HARDIN*, SEPTEMBER 14, 1998 ..... 17a

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COMPLAINT, *MORRISON V. STATE OF NORTH CAROLINA*, AUGUST 24, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

NO. 3:98-CV-370-MU

DANIEL ARTHUR MORRISON,)
)
Plaintiff,)
)
v.)
)
STATE OF NORTH CAROLINA, and the)
Honorable Kenneth W. Honeycutt, in his)
official capacity as District Attorney for)
the 20-B Prosecutorial District,)
)
Defendants.)

COMPLAINT

PRELIMINARY STATEMENT

1. This is a civil rights action in which Plaintiff Daniel Arthur Morrison seeks to have this Court declare unlawful a criminal trial on indictments which allege conduct for which the State of North Carolina has already exacted

criminal penalties through enforcement of a drug tax assessment.

2. This action arises under 42 U.S.C. § 1983; the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; and the Fifth and Fourteenth Amendments to the United States Constitution.

3. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343 (a)(3) (civil rights).

PARTIES

4. Plaintiff Daniel Arthur Morrison is a citizen of Union County, North Carolina.

5. The Superior Court of Union County is an agency of the State of North Carolina existing pursuant to Article IV § 16 of the Constitution of North Carolina, and N.C. Gen. Stat. Chapter 7-A, and is charged with the conduct of civil and criminal trials and the general administration of justice in Union County.

6. The Honorable Sanford L. Steelman, Jr., is a resident Superior Court Judge in Union County, North Carolina, elected to that office pursuant to Article IV § 16 of the Constitution of North Carolina and N.C. Gen. Stat. Chapter 7-A. Judge Steelman presided over pre-trial matters in the

***MORRISON* COMPLAINT, CONTINUED . . .**

prosecution of Plaintiff Morrison on the indictments alleging trafficking in cocaine and, in an Order and Memorandum of Decision filed on August 5, 1998, denied Plaintiff Morrison's motion to dismiss.

7. The Honorable Kenneth W. Honeycutt is the District Attorney for the 20-B Prosecutorial District including Union County, North Carolina, and was elected to that position pursuant to Article IV § 18 of the Constitution of North Carolina, and N.C. Gen. Stat. Chapter 7-A. Mr. Honeycutt is responsible for the prosecution of violations of the state criminal laws in Union County. Mr. Honeycutt personally and/or through his assigned assistant district attorneys obtained the indictments against Mr. Morrison and calendered those matters for trial in the Union County Superior Court.

8. Each of the defendants in this action is sued only in their official capacity.

STATEMENT OF THE CLAIM

9. At all times relevant herein, defendants acted and continued to act in their official capacity and under color of state law.

10. On January 27 and on February 12, 1997 plaintiff was arrested and charged respectively with one count (97 CRS 1174) and four counts (97 CRS 1619-1622) of

MORRISON COMPLAINT, CONTINUED . . .

Trafficking in Cocaine. All charges were filed in the Union County Superior Court.

11. On May 8, 1997, the plaintiff was assessed with tax, penalty and interest under the provisions of N.C.G.S. § 105-113.111 in the amount of $119,579.60. Cash in the amount of $315 seized from the plaintiff was applied towards the tax, and a lien was filed in the Office of the Clerk of Court for Union County in Judgment Docket 54 at Page 289.

12. On January 13, 1998 the Fourth Circuit Court of Appeals held that the tax assessments rendered pursuant to N.C.G.S. § 105 constituted a criminal penalty, *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998). The *Lynn* Court relied upon the analysis of the United States Supreme Court in the case of *Department Of Revenue v. Kurth Ranch*, 511 U.S. 767, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994).

13. On January 22, 1998 Plaintiff Morrison filed a Motion to Dismiss the criminal charges pending against him in the Superior Court based on double jeopardy, citing the decision in *Lynn*. *See* Exhibit 1, attached. On August 5, 1998, the Superior Court, the Honorable Sanford L. Steelman, Jr., presiding, filed and *Order and Memorandum of Decision* denying plaintiff's motion. *See* Exhibit 2, attached.

MORRISON COMPLAINT, CONTINUED . . .

14. Plaintiff's trial is pending in the above-referenced matters at the 17 August 1998 Criminal Session of the Union County Superior Court.

15. By seizing more than three hundred dollars in cash, pursuant to the Drug Tax Assessment provisions of N.C.G.S. § 105 and securing a lien for more than $100,000, and having that judgment entered by the clerk of court, the State of North Carolina has already subjected plaintiff to a criminal penalty. The State is therefore barred by the fifth and fourteenth amendments to the United States Constitution from subjecting him to a criminal trial for the same conduct.

16. In *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), the Fourth Circuit Court of Appeals reviewed a constitutional challenge raised against the Controlled Substance Tax (Drug Tax), N.C.G.S. §§ 105-113.105 through 105-113.113. The *Lynn* Court held that "the Drug Tax is in reality a criminal penalty under *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994). Indeed, in a comprehensive analysis of the Drug Tax, the panel in *Lynn* unanimously concluded that the legislation shared each of the four features found by the *Kurth Ranch Court* to be indicative of a criminal penalty.

17. The Superior Court acknowledges that the Fourth Circuit Court of Appeals decision in *Lynn* compels the conclusion that a trial of Mr. Morrison on these indictments

would subject him to double jeopardy. *Order* at ¶¶ 6-11, attached as Exhibit 2. The Superior Court concluded, however, that based on a *per curiam*, pre-*Lynn* decision by the North Carolina Supreme Court, it was bound to deny defendant's motion to dismiss. *Id.*

18. On August 17, 1998, the plaintiff filed a Notice of Appeal to the North Carolina Court of Appeals with the Clerk for the Union County Superior Court. *See Notice of Appeal*, attached as Exhibit 3.

19. On August 17, 1998 the North Carolina Court of Appeals denied plaintiff's motion to stay the trial pending resolution of the appeal in this matter. *See Order* attached as Exhibit 4. Plaintiff remains on the trial calendar for the present criminal session of the Union County Superior Court.

20. If defendants are not enjoined from subjected plaintiff to a criminal trial at the current session of the Union County Superior Court, on indictments which allege conduct for which the State of North Carolina has already imposed criminal penalties, defendants will subject plaintiff to an irreparable deprivation of his right to be free from double jeopardy as secured by the fifth and fourteenth amendments to the United States Constitution.

22. If defendants are not enjoined from subjecting plaintiff to a criminal trial, under circumstances which the

MORRISON COMPLAINT, CONTINUED . . .

Fourth Circuit Court of Appeals has expressly determined to violate the constitutional prohibition against double jeopardy, because the defendants choose to follow contrary state court interpretations of the federal constitution, plaintiff will be deprived of his constitutional rights under the fifth and fourteenth amendments to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully request that this Court:

1. Assume jurisdiction of this matter;

2. Enter a declaratory judgment declaring that for the State of North Carolina to subject plaintiff to a criminal trial, after the state assessed a criminal penalty against plaintiff pursuant to the "drug tax," would unconstitutionally violate plaintiff's right to be free from double jeopardy;

3. Enter an injunction restraining defendants from subjecting plaintiff to a trial on the above-referenced indictments; and

4. Enter such other and further relief as the Court deems just and proper.

MORRISON COMPLAINT, CONTINUED . . .

Respectfully submitted,

This the 24th ay of August, 1998.

/s/ Henderson Hill
FERGUSON, STEIN, WALLAS, ADKINS,
GRESHAM & SUMTER, P.A.
741 Kenilworth Avenue, Suite 300
Charlotte, North Carolina 28204
(704) 375-8461
N.C. Bar No. 18563

[Exhibits and Certificate of Service Omitted in Printing]

IMPORTANT
Action Must Be Taken
IMMEDIATELY

State of North Carolina
DEPARTMENT OF REVENUE
P.O. BOX 25000
Raleigh, N.C. 27640

Form BD-10
BD

AN: 412142

NOTICE OF CONTROLLED SUBSTANCE TAX ASSESSMENT

DANIEL AURTHUR MORRISON
121 EAST AVE.
MONROE, NC 28110

January 30, 1997
DAN-AU-MORR
Union

YOU ARE HEREBY NOTIFIED that an assessment of controlled substance tax plus interest and any applicable penalty is proposed against you as follows:

TAX	PENALTY	INTEREST*	TOTAL
$78,200.00	$39,100.00	$586.50	$117,886.50

Substances included in this tax assessment are:	Taxable Quantity	Tax Rate	Tax Amount
390.80 grams Crack Cocaine	391.00	200.00	78,200.00

*INTEREST ACCRUES ON ALL UNPAID TAXES FROM JANUARY 27, 1997 TO THE DATE OF PAYMENT.

This assessment is proposed pursuant to G.S. 105-113.111 (See attached copy). If you desire a hearing before the Secretary of Revenue with respect to this proposed assessment, you must submit a written request for hearing within thirty days after the date of this notice, as provided by G.S. 105-241.1. Your request should set forth in detail your objection to the assessment and must be timely served upon the Secretary of Revenue addressed to Controlled Substance Tax Division. Unless your application for hearing is filed within the time stated, this proposed assessment will become final and conclusive without further notice.

In the event you fail to respond immediately to this proposed assessment by remitting the full amount shown due or by posting a bond, collection may proceed pursuant to G.S. 105-241.1(g) or G.S. 105-242 without regard to whether you have requested a hearing.

NOTICE OF TAX ASSESSMENT, CONTINUED . . .

/s/ Muriel K. Offerman
SECRETARY OF REVENUE

By: FRED H. GREGORY
ENFORCEMENT OFFICER

To insure proper credit, please attach your payment to the copy of this notice.

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ORDER - PRELIMINARY INJUNCTION IN *MORRISON V. STATE OF NORTH CAROLINA*, SEPTEMBER 4, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

NO. 3:98-CV-370-MU

DANIEL ARTHUR MORRISON,	)
	)
Plaintiff,	)
	)
v.	)
	)
STATE OF NORTH CAROLINA, and the Honorable Kenneth W. Honeycutt, in his official capacity as District Attorney for the 20-B Prosecutorial District,	)
	)
Defendants.	)

ORDER

PRELIMINARY INJUNCTION

THIS MATTER is before the Court upon Plaintiff's motion for a preliminary injunction (document number 5). A hearing on this matter was held on September 4, 1998.

***MORRISON*, PRELIMINARY INJUNCTION, CONTINUED . . .**

For reasons articulated at the hearing in open court, this Court adopts the findings made during the hearing on the motion for a temporary restraining order held August 26, 1998.

It is therefore ORDERED that:

1) This motion is hereby GRANTED;

2) This Injunction is applicable only to indictment numbers 97-CRS-1174, 97-CRS-1620, 97-CRS-1621, and 97-CRS-1622 now pending in Union County, North Carolina;

3) There being only one factual issue in dispute, the State will provide Plaintiff with information determining whether taxes were assessed pursuant to the North Carolina Unauthorized Substances Tax on 49 grams of cocaine base that is the subject of indictment number 97-CRS-1619 now pending in Union County, North Carolina; and

4) Plaintiff will file a Motion For Summary Judgment in this matter as well as supporting briefs, not to exceed 25 pages in length, on or before November 3, 1998; the State will submit a Response, not to exceed 25 pages, to Plaintiff's Motion within 30 days of service of

same; and Plaintiff may submit a Reply, not to exceed 15 pages in length, within 30 days of service of the Response.

This 4th day of September, 1998.

/s/ GRAHAM C. MULLEN
CHIEF UNITED STATES DISTRICT JUDGE

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RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE, *MCADAMS V. HARDIN*, SEPTEMBER 14, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

MICHAEL D. McADAMS,	)	
	)	
Petitioner,	)	
	)	1:98CV786
v.	)	
	)	
JAMES E. HARDIN,	)	
District Attorney, et al.	)	
	)	
Respondent.	)	

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner Michael D. McAdams, proceeding pursuant to 28 U.S.C. § 2254, filed this habeas corpus action on September 4, 1998. He is represented by retained counsel, Mr. William J. Thomas, II and Mr. Thomas F. Loflin, III. Michael McAdams is not the typical § 2254 habeas petitioner in federal court. He is not before this court challenging the constitutionality of a criminal conviction previously entered against him by a state court. Instead, he is here seeking an order that would prohibit the State of North Carolina from bringing him to trial on a pending indictment for violation of

the state's drug laws. His federal claim is that he would be subjected to double jeopardy if he were to be brought to trial on the state charges.

In support of his petition, McAdams represents to the court that he has previously been served with notice of an "unauthorized substance tax assessment" in the amount of $11,457 under the authority of N.C.G.S. § 105.113.111, a section of the North Carolina Controlled Substance Tax Act. His property was seized in satisfaction of the tax. He now stands indicted on three felony counts relating to the sale and/or possession of cocaine. Petitioner McAdams argues that he has already suffered a criminal penalty in the form of a tax assessment for possession of the controlled substances, and that taking him to trial on criminal charges related to the same drugs would constitute a second jeopardy.

Petitioner's trial in state superior court is calendared for the week of September 14. In view of this fact, McAdams has filed a motion to stay the state court proceedings until his federal rights can be determined in this habeas proceeding. Specifically, McAdams requests an order of this court staying the criminal proceedings against him in the Superior Court for Durham County, file no. 97-CRS-31835, wherein he is charged with three drug felonies.

The Respondents in this case include James E. Hardin, the District Attorney for Durham County and the State of North

Carolina, through the Office of the Attorney General (collectively hereafter, "the State"). Respondents are represented by Mr. Clarence J. DelForge, III, Assistant Attorney General. On September 4, the State filed an answer to the habeas corpus petition, a motion for summary judgment and memorandum in support thereof, and a response in opposition to the motion to stay the state court proceedings. It is unusual for the Petitioner's original papers and the State's responses to all be stamped "filed" as of the same date, September 4, but this circumstance reflects the parties' recognition that expedited procedures are necessary in view of the state court proceedings scheduled to begin as early as September 14.

The court, upon reviewing the filings of the parties, scheduled oral argument on McAdams' petition and motion to stay. On September 9, the court heard the argument of counsel. The court permitted a further written reply by Petitioner. With this record before the court, the court now enters the recommendations set out below.

PETITIONER'S MOTION TO STAY THE STATE COURT TRIAL

In attempting to stay his State criminal prosecution on double jeopardy grounds, McAdams confronts a formidable obstacle, namely the *Younger* doctrine. According to this doctrine, a federal court injunction of a state criminal

proceeding is "a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *Younger v. Harris*, 401 U.S. 37, 41 (1971). *Younger* and its progenies instruct that federal courts should only rarely issue injunctive relief against pending state criminal proceedings.

While *Younger* counsels extreme caution, it does not preclude federal intervention in each and every case. To the contrary, the *Younger* Court indicated that the principles of federalism and comity must yield to weightier concerns in exceptional cases involving, for example, prosecutorial bad faith, statutes which on their face are patently unconstitutional, and situations where there is no adequate state forum available to hear the complaint. *Id.* at 53-54. Furthermore, the list of exceptions to the *Younger* abstention doctrine has been expanded by the lower federal courts. Most significant to this case, the Fourth Circuit recently determined that a double jeopardy allegation "is a preeminent example of one of the very few 'unusual circumstances' justifying federal court intervention in a state proceeding." *Gilliam v. Foster*, 75 F.3d 881, 904 (4th Cir. 1996).

A careful review of *Gilliam*, however, shows that not all double jeopardy claims merit the same treatment. Rather, a key factor present in *Gilliam* that is notably absent from this case is the subjection of the defendant to the hardships of an actual second trial. In this case, Petitioner's alleged "first jeopardy"

was an administrative action in which Petitioner made no appearance. As the Fourth Circuit noted in *Gilliam*, "because the Double Jeopardy Clause of the Fifth Amendment protects not only against multiple convictions but also "against being twice put to trial for the same offense," a portion of the constitutional protection it affords would be irreparably lost if Petitioners were forced to endure the *second trial* before seeking to vindicate their constitutional rights at the federal level." *Id.* at 904 (quoting *Abney v. United States,* 431 U.S. 651, 660-61 (1977)) (emphasis added). Thus, in balancing the potential harm faced by a defendant asserting the protection afforded by the Double Jeopardy Clause with the potential harm to the independence of the state courts, the mere fact that the defendant has made a theoretically viable double jeopardy claim is not enough to justify federal court intervention. *See United States ex rel. Stevens v. Circuit Court of Milwaukee County,* 675 F.2d 946, 949 (7th Cir. 1982) ("Where as in the present case the defendant is not being asked to stand trial a second time - where the first proceeding was as perfunctory as the Constitution allows a guilty-plea proceeding to be - the balance inclines in favor of the state's interest in being allowed to conduct its criminal proceedings without interruption by federal judges. . . . We think the *Younger* policy is the weightier when the defendant is not being asked to undergo a second trial."); *Murphy v. Virginia,* 896 F. Supp. 577 (E.D. Va. 1995) (For purposes of determining whether *Younger* abstention doctrine applies, courts draw a distinction between double jeopardy claims based on multiple punishments and

claims based on multiple prosecutions such that, if the accused is facing multiple convictions, he may appeal those convictions to obtain full relief, where if facing multiple prosecutions, the trial itself is a constitutional wrong, and no trial or appeal therefrom could provide him with an adequate remedy.).

In the case at bar, McAdams is at worst facing the possibility of multiple criminal punishments for his alleged drug activity. He is not being forced to endure the hardships associated with a second full trial. Thus, under a proper reading of *Gilliam,* the principled policies of *Younger* weigh against federal intervention in this case.

Even if the court were to find that the distinction between multiple punishments and multiple convictions was not, in itself, enough to support abstention, a further reading of *Gilliam* indicates that Petitioner McAdams' motion for a stay should be denied in the present case. The *Gilliam* court stressed that federal court interference in state court proceedings is warranted only in the limited circumstance where the Petitioner has made a *"colorable claim* that a second trial will violate a defendant's double jeopardy right." *Gilliam,* 75 F.3d at 904 (emphasis added). Petitioner, in the case at bar, has failed to make the required showing of apparent merit to his double jeopardy claim.

McAdams contends that the drug tax assessed against him by the state constitutes a criminal penalty, such that a

subsequent criminal trial for offenses based upon the same, previously taxed drugs would constitute a second criminal penalty in violation of the Double Jeopardy Clause. In support of his argument, McAdams cites *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), *cert. petition filed*, 66 U.S.L.W. 3750, May 11, 1998, No. 97-1829 (pending), a recent Fourth Circuit decision which held that the North Carolina drug tax is a criminal penalty. The Court of Appeals based its decision upon *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994), a Supreme Court decision that held a Montana controlled substance tax to constitute a criminal penalty.

The *Lynn v. West* decision does not, however, answer all of the questions that must be addressed in the case at bar. It is critically important that, on federal habeas review, a state prisoner may not rely on federal circuit precedent to establish a claim for relief. 28 U.S.C. § 2254(d)(1); *Green v. French*, 143 F.3d 865, 880-84 (4th Cir. 1998) (North Carolina courts may reject Fourth Circuit's adjudication of federal constitutional law so long as state court adjudication reasonably followed United States Supreme Court precedent.). Furthermore, where a state court applies a United States Supreme Court decision to a particular statute or set of facts, the state court opinion cannot be overturned on federal habeas review unless it is unreasonable. 28 U.S.C. § 2254(d)(1). To be unreasonable, a state court application of federal constitutional law must be so clearly erroneous that no reasoning jurist could have reached the same result. *See Green*

v. French, 143 F.3d 865, 870 (4th Cir. 1998); *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997).

The North Carolina appellate courts have analyzed the state drug tax statute in light of the Supreme Court's decision in *Kurth Ranch*, and concluded that the statute was significantly distinguishable from the Montana statute so that the North Carolina tax assessment was not a criminal penalty. *See State v. Creason*, 123 N.C. App. 495, 473 S.E.2d 771 (1996), *affirmed*, 346 N.C. 1165, 484 S.E.2d 525 (1997); *State v. Ballenger*, 123 N.C. App. 179, 472 S.E.2d 572 (1996), *affirmed per curiam*, 345 N.C. 626, 481 S.E.2d 84, *cert. denied*, 118 S. Ct. 68 (1997). Both *Creason* and *Ballenger* held that *Kurth Ranch* was distinguishable because, unlike the Montana tax adjudicated in that case, the

> North Carolina Controlled Substance Tax is not predicated upon whether the taxpayer in possession of the controlled substance has been arrested or charged with criminal conduct, nor is it assessment on property that necessarily has been confiscated or destroyed. Specifically, the North Carolina Controlled Substance Tax provides that 'a tax is levied on controlled substances and counterfeit controlled substances possessed by dealers . . .' at various rates depending on the type of controlled substance possessed.

Ballenger, 472 S.E.2d at 574. While the Fourth Circuit in *Lynn* found these facets of the North Carolina statute not so distinguishable from the aspects of the Montana statute analyzed in *Kurth Ranch*, this contrary circuit authority does not, by its mere existence, render the state decisions necessarily "unreasonable." Rather, this court must survey the judicial landscape in an effort to compare cases from other jurisdictions to determine whether the conclusions reached by the North Carolina courts are so clearly incorrect as to be indefensible among reasonable jurists. *See Green v. French*, 143 F.3d at 880-84 (North Carolina courts may reject Fourth Circuit's adjudication of federal constitution law so long as state court adjudication reasonably follows United States Supreme Court precedent. In addition, fact that other courts followed North Carolina adjudication and rejected Fourth Circuit position shows North Carolina court's adjudication was reasonable.).

An overview of appellate decisions from state courts across the country shows that numerous courts have found respective state drug tax statutes, substantially similar to North Carolina's unauthorized substance tax, distinguishable from the Montana statute analyzed in *Kurth Ranch* on the same essential grounds North Carolina's appellate courts distinguished the Montana statute in *Ballenger* and *Creason*. These cases tend to show that reasonable jurists can and do agree with the North Carolina appellate courts' adjudication of this double jeopardy issue, although still contrary to the Fourth Circuit's adjudication in *Lynn*.

RECOMMENDATION, *MCADAMS V. HARDIN*, CONTINUED . . .

Under these circumstances, Petitioner's motion for a stay of the state criminal proceedings soon to commence against him cannot be granted by this court. *See McMullin v. South Carolina Dept. of Revenue*, 321 S.C. 475, 469 S.E.2d 600 (1996) (South Carolina drug tax upheld because it does not contain the "unusual features" of the Montana tax analyzed in *Kurth Ranch*); *State v. Gulledge*, 257 Kan. 915, 896 P.2d 378 (1995) (court found that the Kansas drug tax was significantly different from the Montana tax because it did not contain any of the "unusual feature" relied upon by the Court in *Kurth Ranch*); *State v. Stubblefield*, 249 Neb. 436, 543 N.W.2d 743 (1996) (found *Kurth Ranch* inapplicable, determining that the Nebraska statute and Montana's differ in material respects); *State v. Lange*, 531 N.W.2d 108 (Iowa 1995) (found that *Kurth Ranch* did not apply and concluded that the Iowa tax was not a criminal penalty); *Covelli v. Comm'r. of Revenue*, 235 Conn. 539, 668 A.2d 699 (1995), *vacated and remanded*, 518 U.S. 1031, *prior opinion affirmed per curiam*, 239 Conn. 257, 683 A.2d 737 (1996) (Connecticut court reaffirmed previous opinion vacated by United State Supreme Court that the state drug tax did not possess identical characteristics of *Kurth Ranch* and therefore did not constitute a criminal penalty for double jeopardy purposes), *cert. denied*, 117 S.Ct. 1445 (1997). Petitioner has not shown a colorable double jeopardy claim for which he would be entitled to habeas relief. Lacking such a

"colorable claim," Petitioner cannot meet the *Gilliam* test for federal intervention in a state criminal trial.[1]

THE STATE'S SUMMARY JUDGMENT MOTION

The State moves for summary judgment on McAdams' habeas corpus petition on grounds that (1) Petitioner has failed to exhaust state remedies with respect to his double jeopardy claim, and (2) the double jeopardy claim is without merit because the superior court opinion rejecting Petitioner's claim is a reasonable application of the Supreme Court's decision in *Kurth Ranch* and therefore, under the standard established in 28 U.S.C. § 2254(d)(1), cannot be overturned on habeas review. On consideration of the argument of the parties, the court finds that the State's first contention is well-taken. Petitioner McAdams has not exhausted available state remedies, and his petition should be dismissed. *See* 28 U.S.C. § 2254(b)(1)(A). The court should not reach Petitioner's double jeopardy claim on the merits.

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[1] In final reply, Petitioner attaches a copy of a recent opinion from the Western District of North Carolina wherein a state drug prosecution was stayed on double jeopardy grounds *in a § 1983 action*. The present action before this court sounds in habeas corpus. Therefore, the deferential standard set out in the new federal habeas corpus amendments applies. In this court's opinion, an action seeking the relief sought here, determination that a pending state prosecution would violate the Double Jeopardy Clause, *must* lie in habeas corpus, not § 1983 procedure.

RECOMMENDATION, *MCADAMS V. HARDIN*, CONTINUED . . .

The state court opinion in issue in this case is a pretrial ruling by the superior court to the effect that prosecution of McAdams in 97-CRS-31835 is not barred by the double jeopardy clause. In a written order, the state judge denied McAdams' motion to dismiss and his "Plea of Former Jeopardy." (State Exh. 1) Petitioner has not sought interlocutory appellate review of this order by filing a writ of certiorari in the North Carolina Court of Appeals or the Supreme Court of North Carolina. While Petitioner contends he has no right to interlocutory review under state procedures, it is clear that his pretrial double jeopardy objection is preserved for ultimate appellate review should he be convicted. Since this court has found no basis for staying Petitioner's state trial, that proceding will presumably go forward as scheduled and result in a judgment of acquittal or conviction, or some other final disposition. Petitioner can then receive review by the North Carolina appellate courts of any claimed error by the trial court, including alleged error in denial of the motion to dismiss on double jeopardy grounds.[2] Clearly, Petitioner has not availed himself of appellate review that is or will be available to him in the state courts.

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[2] Adherence to ordinary principles of complete exhaustion is of heightened importance in a case such as this where the petitioner has not even been convicted in state court. Petitioner's legal claim could obviously be mooted or materially altered by the outcome of his state court trial.

RECOMMENDATION, *MCADAMS V. HARDIN*, CONTINUED . . .

Petitioner McAdams asserts that any presentation of his double jeopardy claim to the state appellate courts would be futile in view of prior North Carolina decisions. The court must reject this claim. It is true that exhaustion may be excused when it is clear that further presentation of a claim to the state courts would be a waste of judicial resources. For example, exhaustion is excused when the state supreme court has determined the same issue, in a manner unfavorable to the petitioner, in a recent case. *See Allen v. Attorney General*, 80 F.3d 569, 573 (1st Cir. 1996); *Wallace v. Cody*, 951 F.2d 1170, 1172 (10th Cir. 1991). The Supreme Court of North Carolina has twice rejected the sort of double jeopardy claim asserted by Petitioner McAdams. *See State v. Ballenger*, 345 N.C. 626 (1997) and *State v. Creason*, 346 N.C. 165 (1997). Nonetheless, subsequent to those decisions the Fourth Circuit decided *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), *cert. petition filed*, 66 U.S.L.W. 3750, May 11, 1998, No. 97-1829 (pending), determining that North Carolina's controlled substances tax constitutes a criminal penalty. The *Lynn v. West* decision has not been considered by the North Carolina appellate courts. The principles of comity that underlie the exhaustion requirement counsel strongly in favor of allowing the state courts an opportunity to consider Petitioner's double jeopardy claim in light of *Lynn v. West* before this court entertains such a claim on the merits. Under these

circumstances, Petitioner's "futility" argument is not persuasive.[3]

The court therefore should not reach McAdams' petition on the merits, but should dismiss the petition for lack of exhaustion pursuant to 28 U.S.C. § 2254(b)(1)(A).

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[3] Moreover, there are other facets to Petitioner's double jeopardy claim beyond the issue of whether North Carolina's controlled substances tax is a "criminal penalty." Even if it is construed to be a criminal penalty, it does not inevitably follow that a double jeopardy is established by a subsequent criminal prosecution. *See Kurth Ranch,* 511 U.S. at 781-82 n. 21 ("[This Montana tax statute] does not raise the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character. See JUSTICE SCALIA'S dissent, *post,* at 804. Nor does the statute require us to comment on the permissibility of "multiple punishments" imposed in the same proceeding, cf. *Ex parte Lange,* 18 Wall. 163 (1874); *North Carolina v. Pearce,* 395 U.S. 711 (1969), since it involves separate sanctions imposed in *successive* proceedings.") Accordingly, the state courts should be given the first opportunity to consider whether a double jeopardy claim is made out as to any conviction against Petitioner (if he is convicted) even assuming that the North Carolina tax may be construed as a criminal penalty.

RECOMMENDATION

For reasons set forth above, IT IS RECOMMENDED that Petitioner McAdams' motion to stay the state criminal trial against him be denied, and that his petition for a writ of habeas corpus be dismissed for lack of exhaustion.

/s/ P. Trevor Sharp, U.S. Magistrate Judge

September 14, 1998